

REUELU (Migration) [2023] AATA 3723 (23 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Tekie Eleni REUELU
VISA APPLICANT:	Mr DHARMINDER SINGH
REPRESENTATIVE:	Ms Diana Tong (MARN: 9359088)
CASE NUMBER:	1832158
DIBP REFERENCE(S):	BCC2016/1335935
MEMBER:	David Barker
DATE:	23 October 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211 of Schedule 2 to the Regulations • cl 309.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 23 October 2023 at 2:55pm

CATCHWORDS

MIGRATION –Partner (Provisional) (Class UF) visa - subclass 309 – couple view their relationship as a long-term one – Tribunal is satisfied their relationship is a genuine and continuing relationship –parties have a child together – parties represent themselves as a couple in a genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5CB, 65, 359, 376

Migration Regulations 1994, r 2.03A, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206
Re MILGEA and Dhillon [1990] FCA 144

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 September 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (**the Act**).
2. The visa applicant applied for the visa on 1 April 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (**the Regulations**). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 of the regulations because the delegate was not satisfied the evidence established the relationship between the visa applicant (**the applicant**) and the review applicant (**the sponsor**) was genuine.
4. The sponsor appeared before the Tribunal on 7 September 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant and Mr Jasvir Singh, a friend of the applicant.
5. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The applicant is a national of India and is 36 years old. He was previously married to Ms Lovie Lourdes Fernandes from February 2010 to January 2016, however the relationship is reported to have ceased in 2015. There were no children born from that relationship and with the relationship reported to have . The applicant unsuccessfully applied for a Subclass 820 Provisional Partner visa on the basis of his relationship with Ms Fernandes, with that visa application being pressed following the breakdown of the relationship, through the applicant claiming that he was a victim of family violence perpetrated by his previous spouse. The visa application was refused in February 2015 and that visa refusal decision was affirmed by the Tribunal, differently constituted, on 28 April 2016. The applicant subsequently, in May 2016, unsuccessfully applied for Ministerial intervention in relation to the refusal of the Partner visa.
9. The applicant has unsuccessfully applied for a number of visas since arriving in Australia in October 2008¹, with the most recent, apart from the sc 309 Partner visa refusal which is the focus of this review application, being a subclass 866 Protection visa, applied for on 23 June 2016 and refused 15 February 2019².
10. The sponsor was born in New Zealand and became an Australian citizen by grant in 2019. She is 41 years old. She has one declared former spouse, Parmivir Singh Sidhu (alias Ravinder Dhiunda), to whom she was married from August 2000 to December 2014 and who

¹TBE Nomination Business Sponsorship refused 22 May 2015, 15 June 2015 and 15 September 2015; UC-457 (Temporary Work Skilled) visa application commenced 14 April 2015 –refused 5 November 2015.

² The sc 866 refusal decision is also currently on review at the Tribunal.

she sponsored to migrate to Australia on a Partner visa. That marriage ended by divorce. There was one child from that relationship, Harnur, born 2003. The sponsor also has a child, Selesitina, born 2013, from an undeclared relationship, which the sponsor described as a transitory connection with the child's biological father.

11. In the visa application form generated on 1 April 2016 it states the applicant and sponsor (hereafter referred to as the parties) first met in Mount Druitt, NSW, in August 2014 and that they committed to a shared life together to the exclusion of all others on 8 January 2015, whereas in a relationship statement prepared in December 2016 and subsequent statutory declarations³ the applicant stated that he first met the sponsor in Plumpton, NSW in March 2015. They registered their relationship with NSW Births, Deaths and Marriages on 23 April 2016.
12. A child, Seeret, from the parties' relationship was born in Blacktown hospital in May 2016.
13. Documents provided to the Department in support of the visa application included, but was not limited to:
 - Bank account transaction statements and other financial records;
 - Superannuation and health insurance documents;
 - Joint tenancy bond for accommodation shared by the applicant and sponsor dated 2 September 2015
 - Tenant ledger projecting rent payment from 27 August 2015 to 30 July 2018;
 - Utility account bills and statements;
 - Photographs
 - Form 888 – Statutory Declaration of sponsor's sister, Ms Luisemoe Peta Reuelu dated 10 June 2016
 - Form 888 – Statutory Declaration of sponsor's stepfather, Mr Colin John Strange dated 10 June 2016
 - Statement of visa applicant dated 7 December 2016
 - Statement of sponsor dated 7 December 2016
 - Relationship certificate issued in Australia for the applicant and sponsor dated 23 April 2016
 - Divorce decree with the applicant's former partner;
 - Divorce decree with the sponsor's former partner;
 - Birth certificate and passport of the applicant and sponsor's child; Dhanoa
 - DNA Labs Parentage Testing Procedure Report dated 1 February 2018

³ Statutory declaration dated 18 April 2023.

14. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following:
- Bank account statements and other financial evidence;
 - Superannuation information;
 - Joint tenant ledgers for Philip Street, St Marys property, for the period August 2015 to May 2019 and payment history July 2019 to August 2020
 - Joint Tenant Payment history for Westcott Place, Oakhurst property for the period 27 July 2019 to 19 August 2020
 - Joint Residential Tenancy Agreement Hythe Street Mount Druitt dated 23 April 2022
 - Joint Tenant History statement for 5/30 Hythe Street Mount Druitt property for the period 11 August 2020 to 13 April 2023;
 - Utility, internet, insurance and telephone account bills, policies and statements;
 - Receipts and invoices;
 - Travel records
 - Photographs
 - Screenshots of video calls between visa applicant and sponsor and family members
 - Statement of support from Amrik Singh (father of the visa applicant) dated 11 April 2023
 - Form 888 – Statutory Declaration of Jasvir Singh dated 18 April 2023
 - Form 888 – Statutory Declaration of Shamsher Singh Sandhu (friend) dated 3 March 2023
 - Form 888 – Statutory Declaration of Shamsher Singh Sandhu (friend) dated 12 April 2023
 - Form 888 – Statutory Declaration of Colin John Strange (brother of sponsor) dated 17 April 2023
 - Form 888 – Statutory Declaration of Sele Reuelu (mother of sponsor) dated 14 April 2023
 - Form 888 – Statutory Declaration of Vaimona Reuelu (sponsor's sister) dated 9 March 2023
 - Form 888 – Statutory Declaration of Luisemoe Peta Reuelu (sponsor's sister) dated 12 April 2023
 - Statutory Declarations of visa applicant dated 5 March 2023, 18 April 2023;
 - Statutory Declaration of sponsor dated 17 April 2023, 18 April 2023;

- Divorce Order of sponsor and ex-spouse Ravinder Dhindsa dated 5 November 2014
 - NSW Marriage certificate of visa applicant and ex-spouse Lovie Lourdes Fernandes dated 13 December 2013
 - Certificate of Marriage between visa applicant and ex-spouse Lovie Lourdes Fernandes dated 17 February 2010
 - Divorce Order of visa applicant and ex-spouse Lovie Lourdes Fernandes dated 9 December 2015
 - NSW Relationship Certificate for the visa applicant and sponsor dated 23 April 2016
 - NSW Birth Certificate for the visa applicant and sponsor's daughter, Seeret Cj Dhanoa dated 25 May 2016
 - Passport of Seeret CJ Dhanoa
 - Citizenship certificate for Seeret CJ Dhanoa dated 16 January 2016
 - Passport of Selesitina Reuelu (sponsor's daughter)
15. The Tribunal granted the applicant's request for time to provide further evidence following the hearing and on 5 October 2023 received documents, including further representative submissions and two psychology reports. In relation to these submissions and reports, the Tribunal has placed no weight on the psychologists opinions with regard to whether the parties relationship is genuine. This is something for the tribunal to decide. The tribunal notes the submissions regarding the best interest of the parties child and of the sponsor's other children, who have a strong connection to the applicant. The Tribunal notes that the best interests of children is not a required consideration when determining whether the applicant is in a genuine relationship with the sponsoring partner. The tribunal does however consider the representative's contentions about how the parties' family household functions are consistent with the other available evidence and to this extent consider the documents received after the hearing to be relevant to the nature of the parties household arrangements and the commitment aspects oof their relationship.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision.
17. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant, sponsor and witness at the hearing. The Tribunal has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision. The tribunal has also found the applicant, sponsor and witnesses to be credible in the manner in which they gave their evidence at hearing and am satisfied that their evidence can be viewed as reliable.
18. The Department issued a certificate under s 376 of the Act, which if valid, gives the Tribunal the power to restrict, or release documents covered by the certificate. In this matter the Tribunal considered submission from the parties with respect to the validity issue and has determined the certificate is valid and proceeded to exercise the discretion available to it and put the gist of information from the documents to the parties, pursuant to s 359AA of the Act,

which the Tribunal considered would, subject to the sponsors comments, provide the reason or part of the reason to affirm the decision under review.

19. The gist of the information is that the sponsor has previously sponsored another applicant for a partner visa where there were children from her relationship with that applicant. The applicant is also applied for a previous partner Visa, where there were allegations that the relationship with the sponsor for that Visa was a contrived for migration purposes and that there was a family violence claim made after sponsorship was withdrawn but no documentary evidence was filed in support of that claim. The applicant appears to have maintained a clear intention to gain permanent residency in Australia and has also applied for other visas, including business and protection visas, which have been refused.
20. The Tribunal explained that these particulars of information are relevant as they are possible indicators that the parties are in a contrived relationship for migration purposes and if the tribunal were to prefer this explanation over the parties claim to be in a genuine relationship it would find the applicant is not sponsored by a person he is in a genuine continuing de facto relationship with and as a consequence the Tribunal would affirm the decision under review.
21. By way of response the sponsor, being of the parties to which this information was put for comment irrespective of the review outcome the parties would remain together and if needs be move the family to India. Their priority is to work hard to provide the best future for the children and that being together was part of this whether that be in India or Australia.

Whether the parties are in a spouse or de facto relationship

22. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

Are the parties in a de facto relationship?

23. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
24. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
25. In *Re MILGEA and Dhillon* [1990] FCA 144 (**Dhillon**), the Federal Court stated, "*people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the*

matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."

26. Are the other requirements for a de facto relationship met?

27. Financial aspects of the relationship

28. The Tribunal has considered the financial aspects of the relationship, including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
29. The parties gave evidence that to date they have no shared assets of any significance, no shared liabilities and no legal obligations with respect to each other. They have however operated a joint account with Westpac bank since 2015, into which their respective employment incomes are deposited and from which rent, utility bills and all other basic expenses are paid. Documentary evidence has been filed with the tribunal, which in the judgement of the tribunal supports the contention that the parties pool their financial resources to meet financial commitments and regular household expenses. The tribunal has also placed weight on the parties ability to explain a random selection of transactions from the joint Westpac account statements.
30. The Tribunal considers the financial aspect of the parties relationship to be consistent with two people on modest incomes and with significant familial responsibilities who are in a couple relationship. The tribunal has placed positive weight on the evidence about the financial aspects of the parties relationship.

31. The nature of the household arrangements

32. The Tribunal has considered the nature of the household, including: any joint responsibility for the care and support of children; the parties' living arrangements; and any sharing of housework.
33. The Tribunal accepts the parties claim to share the care and responsibility of their daughter, born 2016 and that the applicant also has a strong and meaningful role in the life of the sponsor's other children. There is evidence to support the parties claim to have shared a household together since August 2015 and the tribunal accepts that they currently reside in rental accommodation in Mount Druitt, NSW and have done so since August 2020. As to who does what within their household, which consists of the parties, their daughter, one of the sponsors children and her younger brother, The Tribunal accepts that the applicant picks the children up from school most of every Tuesday and Wednesday and sometime on Monday's, with the sponsor covering Thursdays and Fridays and takes the children to school each school day. The tribunal accepts that these arrangements reflect the parties availability, governed by the employment and that they also share other tasks required to run their family household.
34. The Tribunal is satisfied that the nature of the parties' household arrangements supports a finding that they have a mutual commitment to a shared life together as a couple in a de facto relationship. The Tribunal has given weight to this aspect of the parties' relationship.

35. The social aspects of the relationship

36. The Tribunal has considered the social aspects of the relationship, including whether the parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

37. The Tribunal has reviewed the available evidence and is satisfied it demonstrates that the parties have presented as a couple to NSW Births, deaths and marriages and to their respective superannuation schemes.
38. The evidence provided by witnesses, through declarations provided at the time of application and at the present time supports the claim that the parties present to family and friends as a couple in a committed relationship. The Tribunal had the benefit of witness at hearing of Mr Jasvir Singh, who gave clear and credible evidence as to why he attests to the genuine nature of the parties relationship. Mr Singh told the tribunal he has known the applicant for around six years and that they visit each other's households regularly, socialising with their respective families. He indicated he has as a consequence had the opportunity to observe the applicant and sponsor together on many occasions. The tribunal has placed weight on the evidence provided by Mr Singh.
39. The Tribunal has reviewed photographs and is satisfied these show the parties together in the company of the other people, including when in company with the secondary applicants, in a manner which is consistent with their representation to these other people as a couple. The Tribunal is also satisfied the context of photographs provided show the parties sharing social activities and interests, over time, in a manner which is consistent with evidence provided at hearing.
40. The Tribunal finds that the parties represent themselves as a couple in a genuine and continuing relationship and that is recognised by their friends and family.
41. The Tribunal finds the social aspects of the relationship support a finding that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life together to the exclusion of all others.
42. *The nature of the parties' commitment to each other*
43. The Tribunal has considered the nature of persons' commitment to each other, including: the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
44. The Tribunal is satisfied the parties have a long term relationship and has placed weight on this and the duration of the time in which they have resided together in a shared household. The parties share the care of children, including a child born from their relationship and the tribunal has no concern that the birth was arranged to facilitate a migration outcome.
45. The parties gave consistent and credible evidence as to their commitment to each other, their children and their relationship. The Tribunal accepts that the parties provide each other with emotional support and companionship and notes that their separate evidence with respect to this factor was compelling and the Tribunal has no concern as to the possibility it was disingenuous.
46. The Tribunal finds the parties registered their relationship in April 2016. The Tribunal accepts that the parties have not lived separately and apart since in or around August 2015. The Tribunal finds the parties both view their relationship as long term and has given weight to this factor and as well the duration of both the relationship and the period in which the parties have lived together.
47. *Overall assessment of the de facto relationship*

48. The Tribunal notes there is no evidence to suggest either of the parties are in a relationship with a third party. There is also no evidence to establish the parties do not live together at the present time at the same residential address. The Tribunal considers the financial and social aspects of the parties' relationship, their household arrangements and the nature of their commitment to each other and their relationship are indicative of a couple in a genuine, ongoing, committed relationship.
49. Consistent with *Dhillon*, the Tribunal considers that the relevant test in this matter is whether at the time at which the matter has to be decided, it can be said that the parties have a mutual commitment to a shared life to the exclusion of others. It is the Tribunal's view that there is persuasive evidence that at the time of decision the parties are in a genuine and continuing relationship. The Tribunal also finds that the parties are not related by family.
50. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision.
51. Therefore, the visa applicant meets cl.309.211 and cl.309.221.

Are the additional criteria for a de facto relationship met?

52. Persons lodging an application for a partner visa on the basis of being in a de facto relationship must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
53. The exception to the requirement, relevant to de facto relationship criteria that the parties had been living together for at least the period of 12 months ending immediately before the date of the application by having their relationship registered is an exception created by the legislation. The Tribunal is aware that the registration of relationships is an option that is available to couples, such as the parties, who reside in NSW and that the parties registered their relationship with NSW Births, Deaths and marriages on 23 April 2016. Accordingly, the 12 month requirement does not apply.
54. For these reasons, the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
55. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

56. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
 - r.2.03A

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).